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No. 82-849

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

SERGIO ELEJAR MENDOZA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the United States may be collaterally estopped from litigating a question of constitutional law of public importance by the judgment of a district court in a prior case, involving different parties, in which the question was resolved adversely to the United States.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 672 F.2d 1320. The opinion of the district court (Pet. App. 22a-24a) is not officially reported. The findings of fact, conclusions of law and recommendations of the designated naturalization examiner (Pet. App. 25a-33a) are likewise unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 34a) was entered on April 2, 1982, and a timely petition for rehearing was denied on July 22, 1982 (Pet. App. 35a). On October 13, 1982, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including November 19, 1982. The petition was filed on

the latter date and was granted on January 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

Sections 701, 702 and 705 of the Nationality Act of 1940, 8 U.S.C. (Supp. V 1945) 1001, 1002 and 1005; Section 310(e) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1421(e); and 28 C.F.R. 0.20(b) are reproduced in an appendix to this brief, *infra*, 1a-3a.

STATEMENT

Respondent, a Filipino national, entered the United States in 1975 in a nonimmigrant status. On May 10, 1978, after other legal avenues intended to prolong his stay in the United States had been exhausted or abandoned, respondent filed a petition for naturalization under Section 701 of the Nationality Act of 1940. Section 701, a provision then no longer in force, had relaxed the normal naturalization requirements for certain individuals who fought in the United States armed forces in World War II. Respondent claimed that he was entitled to naturalization based upon his service during World War II in the Army of the Commonwealth of the Philippines. The designated naturalization examiner recommended that the petition be denied, noting that respondent was not eligible for naturalization under the provisions of the Immigration and Nationality Act of 1952 then in effect and that naturalization under Section 701 of the 1940 Act was unavailable because petitioner had not filed for naturalization by December 31, 1946, the date on which that provision expired. The examiner also rejected respondent's argument that naturalization was necessary to remedy an alleged denial of due process in the administration of Section 701 in the Philippines at the close of World War II.

The district court rejected the naturalization examiner's recommendation and granted the petition without reaching "the Constitutional issues or other merits of the petition" (Pet. App. 22a). The district court concluded that the United States was collaterally estopped to oppose respondent's naturalization petition because the constitutional question presented by that petition had been resolved adversely to the United States in a case involving the naturalization petitions of different individuals, *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975). The court of appeals affirmed, like the district court relying solely upon the doctrine of collateral estoppel.

A. The Background of this Case

1. Respondent served as a physician with the Philippine Commonwealth Army from December 1, 1941, until June 30, 1946. During that time, as the United States became involved in World War II, the Commonwealth Army, which was ordinarily under the control of the semi-autonomous Commonwealth government in peacetime, was incorporated into the armed forces of the United States pursuant to the order of President Roosevelt.[1] Respondent was held prisoner by Japanese forces from April 1942 until February or March 1945. Upon his release respondent remained in the Commonwealth Army. In the fall of 1945 the United States Army sent respondent to Pennsylvania for approximately six months of medical training. Shortly after his return to the Philippines, on June 30, 1946, respondent secured his discharge from the Commonwealth Army. Pet. App. 7a.

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[1] Pursuant to Section 10(a) of the Philippine Independence Act of 1934, ch. 84, 48 Stat. 463, the Philippines were scheduled to become a fully independent, self-governing nation on July 4, 1946. Although the Philippines was a United States possession prior to the latter date, it enjoyed considerable autonomy under the terms of the Independence Act.

2. The statute upon which respondent's petition for naturalization rests is Section 701 *et seq.* of the Nationality Act of 1940, 8 U.S.C. (Supp. V 1945) 1001 *et seq.*, as added by the Second War Powers Act, 1942, ch. 199, Section 1001, 56 Stat. 182-183. Section 701 exempted from some of the usual requirements for naturalization (including literacy in English and a period of residence in the United States) certain alien servicemen who had served honorably in the United States armed forces during World War II in locations beyond the continental limits of the United States. As amended by Section 202(c)(1) of the Act of Dec. 28, 1945, ch. 590, 59 Stat. 658, the Act specified that any petition thereunder was to be filed no later than December 31, 1946.

Section 702 of the 1940 Act provided for the *overseas* naturalization of persons actually serving in the United States armed forces who were eligible for naturalization under Section 701 but who were beyond the jurisdiction of the United States courts vested with naturalization authority. Representatives designated by the Commissioner of Immigration and Naturalization were authorized to receive petitions, conduct hearings, and grant naturalization outside the United States. Pursuant to Section 705 of the 1940 Act, the Commissioner and the Attorney General implemented the provisions of Sections 701 and 702. Between 1943 and 1946 immigration officers traveled on rotation through Great Britain, Ireland, North America and the Pacific Islands, admitting thousands of foreign nationals serving in the United States armed forces to citizenship.

Naturalization of alien servicemen in the Philippines was, of course, impossible during the Japanese occupation.[2] The liberation of the Philippines by Allied forces began in February 1945. After resolution of some thresh-

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[2] Between 1942 and 1945, however, approximately 7,000 Filipino servicemembers were naturalized under Section 701 at locations outside the occupied Philippines.

old questions respecting the application of Section 701 to Filipino servicemen,[3] the Immigration and Naturalization Service, in early August 1945, designated George Ennis, an American vice-consul in Manila, to naturalize aliens pursuant to Section 702. Almost immediately, the Philippine government expressed its concern to the State Department about the possibility that large numbers of young Filipino men, perhaps as many as 250,000, would be naturalized and leave for America on the eve of the scheduled Philippine independence (see page 3 note 1, *supra*). On September 13, 1945, the Commissioner of Immigration and Naturalization recommended to Attorney General Clark that the situation be handled by revoking the authority previously granted to Ennis. The Attorney General approved the Commissioner's recommendation on September 26, 1945, and Ennis' authority to naturalize alien servicemen was thereafter revoked. Naturalizations ceased by October 27, 1945.

The INS subsequently reconsidered and abandoned its prior position (see note 3, *supra*) that members of the Commonwealth Army were eligible for citizenship under

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[3] One question was whether service in the Army of the Commonwealth of the Philippines qualified as service in the military forces of the United States for purposes of Section 701. Doubt existed because the Army of the Commonwealth, an instrumentality of the Philippine government, was simply incorporated as a unit into the United States armed forces by Presidential order. By contrast, a separate unit known as the Philippine Scouts was an integral unit of the United States Army; its members thus had individually enlisted in the armed forces of the United States, and their status for this purpose was comparatively free from doubt. In 1945 the INS concluded that members of both Philippine units were covered by Section 701 (but see page 6 & note 4, *infra*).

A second question concerned the eligibility for naturalization under Section 701 of Filipinos who had never resided in the United States. The Attorney General concluded that prior residence in the Philippines, then an American possession, satisfied the statute's requirements on that score.

Section 701.[4] The revised administrative interpretation substantially diminished the foreign relations difficulties posed by the presence in the Philippines of a United States official authorized to naturalize alien servicemen. Accordingly, in August 1946, the Service once again designated a naturalization representative for the Philippines. The representative remained on duty until December 1946 and naturalized many Philippine Scouts (see page 5, note 3, *supra*) who were still on active duty at that time and were still regarded as eligible under Section 702.[5]

3. Although respondent was present in the Philippines between August and October 1945, when naturalization under Section 702 was possible there, it is undisputed that he made no effort to take advantage of that opportunity. Nor did he make any effort to avail himself of the substantive provisions of Section 701, which were available to him without any need for recourse to the special overseas naturalization provisions of Section 702, during the time he was stationed in Pennsylvania.[6]

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[4] The agency's action was triggered by enactment of the First Supplemental Surplus Appropriation Rescission Act, 1946, ch. 30, 60 Stat. 6, 14, which provided in part that service in the Army of the Commonwealth of the Philippines was not to be deemed service in the United States Armed Forces for purposes of any United States statute conferring benefits on military veterans. But see page 10 note 9, *infra*.

[5] Neither the First Supplemental Surplus Appropriation Rescission Act nor the altered administrative interpretation of Section 701 prompted by that Act (see note 4, *supra*) had any application to members of the Philippine Scouts.

[6] The INS did not adopt its revised interpretation of Section 701, excluding members of the Commonwealth Army from the benefits of that provision, until after the date of respondent's return to the Philippines and his discharge from service.

By the time naturalization was again available in the Philippines under Section 702, respondent was doubly ineligible. First, he was no longer in service. Second, the INS regarded service in the Com-

Respondent returned to the United States in 1975 in a nonimmigrant status. His right to remain was extended by the INS through June 9, 1976. During this time respondent operated a restaurant and attempted to start an export-import business. On July 15, 1976, respondent sought to change his status to that of a Treaty Investor. This application was denied by the INS District Director on August 29, 1977, because respondent had not complied with the conditions of his nonimmigrant status. Respondent took an administrative appeal from that decision, but subsequently abandoned that appeal and filed the petition for naturalization under Section 701 that gave rise to this case.

B. Prior Filipino Veteran Litigation

Because Section 701 required filing of a naturalization petition prior to the close of 1946, its provisions did not give rise to litigation in the ensuing years. In the late 1960's, however, there commenced a significant flow of litigation under Section 701 involving novel arguments resting upon the manner in which Section 702 had been administered in the Philippines during 1945 and 1946. In every case, the immigration petitioner, a Filipino veteran, asserted that naturalization should be granted notwithstanding the expiration of Section 701.[7]

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monwealth Army as nonqualifying under Section 701. In any event, respondent made no application for naturalization at this time either.

[7] Section 329 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1440, currently authorizes naturalization of aliens who fought in this nation's armed forces during World War II. Unlike its predecessor, Section 701 of the 1940 Act, however, the benefits of Section 329 are available only to those who either (1) enlisted or were inducted in certain geographical areas (which do not include the Philippines) or (2) are lawfully admitted to the United States for permanent residence. It is accordingly significantly more restrictive than Section 701. Respondent does not claim eligibility for naturalization under the current provision.

1. In *INS* v. *Hibi*, 414 U.S. 5 (1973), this Court considered the ramifications of the course of administration of Section 702 in the Philippines upon facts strikingly similar to those of the present case. Hibi, a veteran of the Philippine Scouts, entered the United States in 1964 and petitioned for naturalization under Section 701 in 1967. He argued that despite 8 U.S.C. 1421(e), which expressly precludes naturalization under provisions of law no longer in effect, the United States was estopped from enforcing the statutory time limit for filing a petition under Section 701. Hibi claimed that an estoppel arose from the alleged failure of government officials to inform him of his opportunity for naturalization, and from the revocation of Vice-Consul Ennis' naturalization authority in October 1945 and the failure to provide a substitute until August 1946. The district court granted Hibi's petition, adopting his estoppel argument, and the court of appeals affirmed. 475 F.2d 7 (9th Cir. 1973).

This Court summarily reversed, explaining that no estoppel could lie against the government in these circumstances (414 U.S. at 8-9):

> It is well settled that the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress. * * * Here [the INS] has been charged by Congress with administering an Act which both made available benefits of naturalization to persons in [Hibi's] class and established a cutoff date for the claiming of such benefits. [The INS], in enforcing the cutoff date established by Congress, * * * is enforcing public policy established by Congress.
>
> While the issue of whether "affirmative misconduct" on the part of the Government might estop it from denying citizenship was left open in *Montana* v. *Kennedy*, 366 U.S. 308, 314, 315 (1961), no conduct of the sort there adverted to was involved here. We do not think that the failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands

> during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government.
>
> [Hibi's] effort to claim naturalization under a statute which by its terms had expired more than 20 years before he had filed his lawsuit must therefore fail.

2a. In *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975) (hereinafter "*68 Filipinos*"), the district court (Renfrew, J.) considered petitions for naturalization resting upon Sections 701-705 of the Nationality Act of 1940 filed by 68 Filipino veterans who had served in the Commonwealth Army or the Philippine Scouts during World War II.[8] Rejecting the recommendations of the naturalization examiners, the district court granted the petitions with certain exceptions.

The district court first considered the claims of those who it found to have filed timely preliminary applications for naturalization that had not been acted upon. 406 F. Supp. at 937-940. As to these "Category I" veterans, the court held in the alternative that: (1) the failure to process the submitted applications was "affirmative misconduct," which, notwithstanding *INS* v. *Hibi*, *supra*, "estopped [the United States] from relying upon the expiration date of Sections 701-705 as grounds for denial of their petitions for naturalization" (406 F. Supp. at 939; footnote omitted), and (2) because they had done all that was practical to avail themselves of the opportunity provided by Section 701 at the proper time, they should be deemed to have "constructively filed" formal petitions for naturalization within the statutory time limit (*id.* at 940).

The district court defined a second category to include 53 veterans who, like respondent Mendoza, made no effort to secure naturalization under Section 702 in a timely manner. These "Category II" veterans claimed that the

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[8] *68 Filipinos* was not a class action.

absence from the Philippines during the period October 1945 through August 1946 of an official empowered to effect naturalizations denied them equal protection in violation of the Due Process Clause of the Fifth Amendment, and that because of that violation they were entitled to have their tardy naturalization petitions granted. In response the government argued that: (1) Filipinos were overseas aliens unprotected by the Due Process Clause at the time in question because of the enactment, in 1934, of the Philippine Independence Act; (2) the veterans' claims were foreclosed by *INS* v. *Hibi*, *supra*; (3) because Attorney General Clark's decision to withdraw naturalization authority from Vice-Consul Ennis responded to the complaint of a foreign government and was based upon considerations of foreign policy, the veterans' claims presented a nonjusticiable political question; and (4) the Attorney General's action did not deny the veterans' due process.[9]

The district court rejected each of these contentions (406 F. Supp. at 940-951). The court acknowledged that "the actions of the Commissioner of the INS were motivated by reasonable concern for the maintenance of amicable relations between the United States and the Philippine Islands" (*id.* at 951). Nevertheless, the court, applying a strict scrutiny standard,[10] held that "the failure of the Government to have stationed in the Philippine Islands a representative of the INS authorized to naturalize mem-

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[9] ..fter the decision in *In re Munoz*, 156 F. Supp. 184 (N.D. Cal. 1957), the INS abandoned the argument that provisions of the First Supplemental Surplus Appropriation Rescission Act, 1946, rendered the benefits of Section 701 unavailable to veterans of the Commonwealth Army, and did not otherwise argue thereafter that service in the Commonwealth Army was nonqualifying for purposes of Section 701. Compare pages 5-6 & notes 3-4, *supra*.

[10] In the district court's view, absence of a naturalization officer from the Philippines constituted discrimination upon the basis of race, alienage or nationality, and was accordingly subject to strict scrutiny (406 F. Supp. at 950).

bers of the American armed forces pursuant to Section 702 of the 1940 Act during all of the time those statutory rights were available denied petitioners due process of law" (406 F. Supp. at 951). Thus, the district court granted the naturalization petition of each of the Category II veterans. Only those ("Category III") veterans who were unable to show that they had ever been eligible for naturalization under Section 701 were denied naturalization (*id.* at 937, 951).[11]

b. Pursuant to authority delegated by the Attorney General to determine whether an appeal should be taken from a judgment adverse to the interests of the United States, see 28 C.F.R. 0.20(b), in March 1976 the Solicitor General authorized an appeal from the district court's decision. An appeal to the Ninth Circuit was docketed and the case was briefed and readied for oral argument.

In the interim, however, a new Administration had taken office. By memorandum dated September 21, 1977 (Pet. App. 36a-42a), newly appointed INS Commissioner Castillo sought authorization to withdraw the pending appeal (see *id.* at 30a). Noting that "[t]he desire expressed by the Philippine Government in 1945 to hold onto its young manpower in the post-war period" was no longer an operative consideration (*id.* at 41a), the INS Commissioner stressed that acquiescence in the naturalization of the *68 Filipinos* petitioners "would be in keeping with the policy of the [new] Administration," described as "a course of compassion and amnesty" (*id.* at 42a). Commissioner Castillo's request provoked considerable discussion, and some dissent, within the Department of Justice. The

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[11] Shortly after rendering its opinion, the district court issued an addendum thereto, responding to the decision in *Santiago* v. *INS*, 526 F.2d 488 (9th Cir. 1975) (en banc), which apparently had given it cause to reconsider its application of equitable estoppel to the claims of Category I veterans. In the addendum (406 F. Supp. at 951), the district court reaffirmed its alternative holding that the Category I veterans had constructively met the stautory time limit, and observed that the court's due process ruling respecting Category II veterans was applicable, as well, to the Category I veterans.

memoranda prepared for the Solicitor General's consideration reflect the conviction that the district court's legal conclusions were legally erroneous, but that acquiescence in naturalization of the petitioners would be an acceptable accommodation in light of the inequities perceived by the officials vested by law with policy making authority, and would not affect significant numbers of individuals or establish a binding precedent. In response to these recommendations, on November 14, 1977, the Solicitor General authorized withdrawal of the pending appeal. On November 30, 1977, the court of appeals granted the government's motion to dismiss the appeal.

c. In the aftermath of these events, Commissioner Castillo was questioned during congressional oversight hearings about his recommendation that the appeal in *68 Filipinos* be dismissed.[12] The government's position respecting Filipino veterans' naturalization petitions under Section 701 was also reconsidered within the Department of Justice. The position ultimately adopted in 1978, after thorough reexamination, was that the Department would not ordinarily oppose naturalization of Filipino veterans who had actually attempted to become naturalized United States citizens pursuant to Sections 701 and 702 while those provisions were in effect—*i.e.*, "Category I" veterans. Contrary to the position adopted in withdrawing the appeal in *68 Filipinos*, however, the Department instructed the INS thereafter to oppose naturalization of all those who could not satisfy this prerequisite, including "Category II" veterans. See Pet. App. 30a; *Olegario* v. *United States*, 629 F.2d 204, 214 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981).[13]

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[12] Commissioner Castillo explained that his recommendation had been based on equitable considerations "aside from the legal argument of, was correct procedure of process used." *Oversight of INS Programs and Activities, Hearings Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 272 (1978).

[13] To mitigate any hardship that might otherwise result from this change in policy, the Solicitor General adopted a "grandfather rule"

3. The issues presented by the filing of tardy naturalization petitions by Filipino veterans resting on Section 701 were next considered by the Second Circuit in *Olegario* v. *United States*, *supra*. Adopting Judge Renfrew's reasoning in *68 Filipinos*, the district court had granted Olegario's petition for naturalization, 473 F. Supp. 185 (S.D. N.Y. 1979), and the government appealed.[14] On appeal, the Second Circuit considered the argument that under *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), the unappealed final judgment in *68 Filipinos* should be given collateral estoppel effect, so as to preclude denial of naturalization to any "Category II" Filipino veteran. The Second Circuit rejected this contention, observing that "[i]n contrast to *Parklane*, the government is the defendant here, and the case raises issues of national concern." 629 F.2d at 215. The court noted that the government's failure to appeal an adverse decision may rest upon policy

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exception to this general rule, declining to authorize appeal from orders granting naturalization to Category II Filipino veterans who had filed naturalization petitions prior to the withdrawal of the government's appeal in *68 Filipinos*. See *Olegario* v. *United States*, *supra*, 629 F.2d at 214-215. The grandfather exception was adopted because there was reason to believe that processing of at least some such petitions had been delayed by INS, either unilaterally or by agreement with opposing counsel, in anticipation of securing a definitive ruling upon appeal in *68 Filipinos*. It was further recognized that absent that procedure some of the petitions involved would have been granted at the time the government withdrew its *68 Filipinos* appeal. Because it was thought difficult to determine with confidence which naturalization petitioners had relied to their detriment upon such procedural understandings, the Solicitor General authorized withdrawal of previously authorized appeals in all cases falling within the "grandfather rule" and declined to authorize appeal in other such cases. Among the appeals withdrawn were those in *In re Nisperos*, 471 F. Supp. 296 (C.D. Cal. 1979), and *In re Colmenar*, No. 308-P-22551 (S.D. Cal. Mar. 20, 1979). See Pet. App. 8a.

[14] Olegario was a "Category II" veteran—*i.e.*, he had not made a timely effort to avail himself of the benefits of Section 701. Nor was his petition filed in time to benefit from the "grandfather rule" adopted by the Solicitor General (see page 12 note 13, *supra*).

considerations, rather than acquiescence in the decision's legal reasoning, and that the invocation of collateral estoppel would compel the Solicitor General to authorize appeal from adverse decisions in an uncritical manner (*ibid.*). The court also stressed that the United States has broad discretion whether to pursue an appeal in a particular case and remains free to change positions previously adopted whenever a prior position is determined to have been ill-advised (*id.* at 216). Turning to the merits, the Second Circuit concluded that the absence of a naturalization officer from the Philippines during part of the period when naturalization under Section 701 was authorized did not violate the statute itself or work a denial of due process or equal protection. 629 F.2d at 223-233. Accordingly, the Second Circuit reversed the district court's decision and directed that Olegario's petition be denied.

C. Proceedings Below

1. Respondent filed his naturalization petition, invoking Section 701 of the 1940 Act, on May 10, 1978. The designated naturalization examiner recommended denial of the petition (Pet. App. 25a-33a). The examiner noted that respondent could not qualify for naturalization under the current provision for naturalization of alien servicemen, 8 U.S.C. (& Supp. V) 1440 (see page 7 note 7, *supra*), and that 8 U.S.C. 1421(e) precludes naturalization under expired or superseded statutory authority. Because respondent had not claimed that he sought naturalization under Section 701 in a timely manner, and because respondent had actually been in Pennsylvania for much of the time overseas naturalization under the extraordinary provisions of Section 702 was unavailable in the Philippines, the examiner concluded that respondent could not be deemed constructively to have timely filed his petition under the 1940 Act; respondent's petition was therefore barred by 8 U.S.C. 1421(e). Similarly, given these facts, the examiner found that *Hibi* barred relief on an

estoppel theory and, notwithstanding *68 Filipinos*, that respondent had not suffered any denial of due process.

The district court granted respondent's petition without reaching the merits of respondent's constitutional claim, treating the matter as a routine application of the doctrine of offensive nonmutual collateral estoppel governed by *Parklane Hosiery Co.* v. *Shore*, *supra*.[15] Although the naturalization examiner had noted (Pet. App. 31a) that the effect of 8 U.S.C. 1421(e) had not been considered in *68 Filipinos*, and that respondent, unlike the *68 Filipinos* petitioners, had been in Pennsylvania for most of the relevant time period, the district court did not address the legal effect of these circumstances.

2. The Solicitor General authorized an appeal.[16] The government once again argued that respondent's constitutional claim was nonjusticiable, and in any event without merit. Several arguments not considered in *68 Filipinos* were also advanced. The government argued that: (1) respondent's constitutional claim was barred by laches; (2) naturalization under Section 701 was barred by 8 U.S.C. 1421(e); (3) the remedy awarded for the alleged constitutional violation—naturalization—was tantamount to an equitable estoppel, and thus inconsistent with *Hibi*; and (4) respondent lacked standing to complain of the withdrawal of a naturalization officer from the Philippines, and had suffered no personal deprivation of rights, because he was in Pennsylvania for most of the period in question. The court of appeals affirmed, reaching only the collateral estoppel issue.[17]

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[15] The district court's decision was rendered prior to the Second Circuit's ruling in *Olegario*.

[16] Like Olegario, respondent is a "Category II" veteran and had not filed his petition in time to benefit from the Solicitor General's "grandfather rule" (see page 13 note 14, *supra*).

[17] The court of appeals stated that because respondent may have been in the Philippines for as much as three months during which time he was eligible for naturalization but no naturalization official

The court of appeals concluded that, under *Parklane Hosiery*, the district court did not abuse its discretion in applying collateral estoppel to bar consideration of the government's arguments against respondent's naturalization. The court of appeals stated that none of the circumstances listed by this Court in *Parklane Hosiery* (439 U.S. at 329-331 & nn. 14 & 15) as factors precluding an estoppel was present here. The court also stressed the lack of record support for the government's suggestion that the withdrawal of the appeal in *68 Filipinos* was based in part upon a misapprehension of the practical consequences of doing so, and it questioned whether the underlying issue was of sufficient practical importance to warrant a fresh determination of the legal issue (Pet. App. 12a-15a). The court of appeals acknowledged the conflicting decision of the Second Circuit in *Olegario*, but it rejected the Second Circuit's analysis of the collateral estoppel issue (*id.* at 18a) and held that the Second Circuit's ruling on the underlying merits, although contrary to *68 Filipinos*, was not sufficient reason to deny preclusive effect to *68 Filipinos* (*id.* at 16a-18a).

Finally, the court of appeals rejected the government's contention that *Parklane Hosiery* is inapposite because of the special attributes and interests of the United States as a litigant, and the purely legal character of the questions presented here (Pet. App. 18a-20a). Although it acknowledged that "the government is frequently involved in cases raising issues of great public importance, and that in such cases the public interest in permitting the government to relitigate those issues may outweigh the public interest in avoiding needless litigation" (*id.* at 18a), the court concluded that this is not such a case because it found "no 'critical' need for redetermination" of

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was present, "this is * * * sufficient * * * to implicate his due process rights and place him in the same situation as [the] Category II veterans" whose rights were litigated in *68 Filipinos* (Pet. App. 12a n.8). The court did not address the remaining issues raised by the government that had not been decided in *68 Filipinos*.

the issue and "no compelling public interest in opposing naturalization" of persons such as respondent (*id.* at 19a, 20a). On the contrary, the court thought that the equities strongly supported preclusion (*id.* at 20a-21a).

SUMMARY OF ARGUMENT

The decision of the court of appeals is without precedent. To our knowledge no other appellate court has ever held that the United States may be estopped from litigating a pure question of law, much less a question of constitutional law affecting the special prerogatives of the Executive in the sphere of foreign relations, by the unappealed adverse decision of a trial level court rendered in a different action involving a different opposing party.

A. Contrary to the view of the court of appeals, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), is not controlling here. In *Parklane Hosiery*, the issues upon which preclusion was upheld were factual (see *id.* at 324); here, the underlying issue in dispute is an unmixed question of law, indeed a significant question of constitutional law. This Court has recognized that powerful considerations militate against extension of the preclusion doctrine to purely legal issues—especially those of constitutional import—even when the parties in the successive lawsuits are the same. *Montana* v. *United States*, 440 U.S. 147, 162-163 (1979); *United States* v. *Moser*, 266 U.S. 236, 242 (1924). Application of the preclusion doctrine to a legal issue where there is no identity of parties is especially inappropriate.

B. In *Montana* v. *United States*, *supra*, 440 U.S. at 155, and *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 331, this Court stressed that issue preclusion should not be applied in circumstances where such application would be unfair to a litigant or contrary to significant public policies. The unique attributes and role of the United States as a litigant constitute a special factor that warrants such an exception.

First, application of the issue preclusion doctrine in cases involving the United States must take account of the public interest in the uniform and rigorous enforcement of laws of general importance and applicability. See *Standefer* v. *United States*, 447 U.S. 10, 24-25 (1980); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973). Here, as in *Standefer*, this public interest outweighs the considerations that ordinariiy underlie the preclusion doctrine.

Second, critical practical and legal considerations, applicable whenever the United States is engaged in litigation on questions of public law, argue strongly against the estoppel invoked by the court of appeals. The government is involved in far more litigation than any other party. Moreover, many legal issues of substantial public importance arise only in government litigation. There is a substantial likelihood that, in litigating a recurring issue, the government will at some point encounter an adverse decision. Application of collateral estoppel to bar determination of a legal question in such cases, which include the present one, would substantially disrupt the existing process of development of the law through resolution of conflicts by appeal, en banc review and certiorari, by supplanting the more flexible doctrine of *stare decisis* and the persuasive effect of decisions of coordinate courts with the rigid doctrine of issue preclusion.

Third, invocation of collateral estoppel against the government on recurring legal issues is inappropriate because, through the Office of the Solicitor General, the government, unlike any other litigant, employs a formal and selective mechanism for determining whether to take an appeal from or seek certiorari review of an adverse judgment. The Solicitor General frequently decides against appeal or certiorari even though the legal conclusions of the deciding court are believed to be erroneous. Such decisions rest upon factors including a substantial measure of prosecutorial discretion, equitable and policy considerations, the practical importance of the decision, the limited resources of the government and sensitivity to

crowded dockets of the courts. The decision not to pursue an appeal in *68 Filipinos* was based on several of these factors.

The court of appeals' ruling, if sustained, would require the United States to reconsider its practice of selective pursuit of appeals and certiorari. The existing practice benefits the public interest and facilitates sound judicial management. The alternative—an inflexible policy of appealing (and even seeking certiorari on) the first adverse decision rendered on a legal issue—would burden the courts of appeals and this Court unnecessarily. Judicial economy—the touchstone of the preclusion doctrine—would be disserved.

C. Even if, contrary to our submission, the special status of the government does not warrant consideration in the application of collateral estoppel, and *Parklane Hosiery* is controlling here, the court of appeals erred in approving application of the issue preclusion doctrine in the circumstances of this case.

First, the district court's decision in *68 Filipinos* given preclusive effect is contrary to intervening decisions of a court of appeals and numerous district courts. Second, the court below improperly precluded the United States from litigating not only the issues decided in *68 Filipinos* but also alternative contentions that were never addressed in the earlier case. Third, the facts of this case are materially different from those considered in *68 Filipinos* because respondent was not prejudiced by the challenged government actions. Finally, the court of appeals overlooked the substantial tension between the district court's decision in *68 Filipinos* and this Court's decision in *INS* v. *Hibi*, *supra*. Due regard for the authority of this Court's rulings required the court of appeals independently to assess the merits of respondent's claim.

ARGUMENT

THE UNITED STATES MAY NOT BE COLLATERALLY ESTOPPED FROM LITIGATING THE LEGAL QUESTION WHETHER RESPONDENT IS ENTITLED TO BECOME A NATURALIZED CITIZEN BY THE JUDGMENT OF A DISTRICT COURT IN A PRIOR CASE INVOLVING DIFFERENT PARTIES

A. Collateral Estoppel is Inapplicable to an Unmixed Question of Law Arising upon the Successive Claims of Different Parties

The court of appeals viewed this case as a routine application of the doctrine of nonmutual offensive collateral estoppel, which this Court sanctioned—albeit conditionally—in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979). See Pet. App. 9a-11a. The issue in *Parklane Hosiery*, however, was whether the potential for unfairness that infects the issue preclusion doctrine when a plaintiff seeks to foreclose a defendant from litigating an issue that the defendant has previously litigated unsuccessfully in an action with another party is so pervasive that resort to the doctrine should be barred in all cases. 429 U.S. at 324, 326 n.4, 331. In providing a negative answer to that question, the Court stressed that care must be taken to ensure that collateral estoppel is not applied in circumstances where such use would for any reason "be unfair to a defendant." *Id.* at 331. Moreover, nothing in the Court's opinion dispenses with the established limitations on the issue preclusion doctrine developed in other cases. The court of appeals erred in disregarding these established exceptions to and limitations upon the rule of collateral estoppel.

For instance, the issue whose redetermination was barred in *Parklane Hosiery* was, unlike the underlying issue in this case, factual. 439 U.S. at 324. This Court's focus in cautioning against improper resort to collateral estoppel accordingly was upon circumstances that would militate against precluding relitigation of factual issues. 439 U.S. at 331. See *Standefer* v. *United States*, 447

U.S. 10, 21 (1980). Thus, it is hardly surprising that the court of appeals was able to conclude (Pet. App. 11a-16a & n.11) that none of the arguments against use of collateral estoppel specifically mentioned in *Parklane Hosiery* is present here.[18] This case, by contrast, is governed by the pre-existing exception to the rule of collateral estoppel applicable to pure questions of law arising in successive actions on substantially unrelated claims—an exception recognized in *United States* v. *Moser*, 266 U.S. 236, 242 (1924), and recently acknowledged in *Montana* v. *United States*, 440 U.S. 147, 162-163 (1979).

1. The Court defined the "unmixed questions of law" exception to the rule of collateral estoppel in *Montana* v. *United States*, *supra*, 440 U.S. at 162, quoting *United States* v. *Moser*, *supra*, 266 U.S. at 242 (emphasis added by the *Montana* Court):

> Where * * * a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same.

See also *Restatement (Second) of Judgments* § 28(2) & comments b & c, § 29(7) & comment i (1982). This rule applies with special force when the issues of law are of constitutional dimensions (*Montana* v. *United States*, *supra*, 440 U.S. at 163):

> Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical.

The question presented to the district court for decision in this case—whether the Attorney General violated

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[18] As explained below (pages 37-38), however, the court of appeals' decision does not in fact comport with the Court's cautionary warnings in *Parklane Hosiery*.

the Due Process Clause by failing to station an authorized naturalization representative in the Philippine Islands throughout the time citizenship was available under Section 701—is an unmixed question of law. This Court treated the closely related question presented in *Hibi* in terms of equitable estoppel doctrine as purely legal. 414 U.S. at 8-9; compare *id.* at 9-11 (Douglas, J., dissenting). Similarly, the district court in *68 Filipinos* regarded the question decided there as one of purely legal dimensions. 406 F. Supp. at 948-951. The court of appeals did not suggest that the issue presented in this case is other than purely legal. See Pet. App. 17a & n.14, 20a n.15, 21a (estoppel applied to "the constitutional issues decided in *68 Filipinos*"); see also *Barretto* v. *United States*, 694 F.2d 603, 607 (9th Cir. 1982).[19] Instead, the court below simply asserted (Pet. App. 18a), in reliance on *Montana*, that "[i]t is by now well settled * * * that collateral estoppel * * * may be invoked on * * * pure issues of law."

Contrary to the court of appeals' assertion, however, *Montana* v. *United States*, *supra*, does not support this sweeping proposition. It is true that the Court there upheld the application of collateral estoppel to preclude determination of a question of law. But the doctrine applied in *Montana* was, in practical effect, res judicata. The Court applied the collateral estoppel label because the government had undertaken the first round of litigation through a proxy (see page 23, *infra*). 440 U.S. at 154-155. Moreover, the Court's decision in *Montana* rests upon its conclusion that the case entailed an effort to relitigate a claim not meaningfully distinguishable from that previously adjudicated. The Court explained (440 U.S. at 163): "[T]he legal 'demands' of this litigation are closely aligned in time and subject matter to those

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[19] The court of appeals' decision in *Barretto*, which reaffirms and extends its decision in this case, is reproduced in the appendix to the government's reply brief in support of the petition in this case.

in [the prior case]." The Court's holding thus rests upon the distinction, recognized in *Moser* itself, between reconsideration of a "rule of law" announced in a prior case "upon a different demand," and redetermination of "a fact, question or right distinctly adjudged in the original action." Under *Moser*, as reaffirmed in *Montana*, preclusion is impermissible in the former situation, but permissible in the latter. 440 U.S. at 162-163, quoting 266 U.S. at 242.

The Court recognized in *Montana* (440 U.S. at 163) that "the scope of the *Moser* exception may be difficult to delineate, particularly where there is partial congruence in the subject matter of successive disputes." But in the circumstances of this case there can be little doubt that preclusion is improper, for respondent's claim of eligibility to become a naturalized citizen presents, by definition, a "different demand" from the separate naturalization petitions of the individual petitioners in *68 Filipinos*. See *Montana* v. *United States*, *supra*, 440 U.S. at 154. The rights of respondent were in no sense "distinctly adjudged" in the earlier litigation.

Of course, in *Montana* itself the Court applied preclusion even though the plaintiff, the United States, had not formally participated as a named party in the prior adjudication. 440 U.S. at 155. The Court concluded that there was no reason to prevent the operation of collateral estoppel simply because the causes of action in successive cases against the same defendant were technically distinct, because in the first action the government had litigated by proxy, financing and controlling the earlier case. *Id.* at 154-155. Here, however, respondent's claim was not presented vicariously or otherwise in the prior action. There is accordingly no reason to treat that claim as indistinguishable for preclusion purposes from the individual claims of the veterans that were before the district court in *68 Filipinos*.

Indeed, in so treating respondent's claim the court of appeals retrospectively converted *68 Filipinos* into a

class action of sorts, holding that the *68 Filipinos* judgment binds the United States as against any Filipino veteran who may hereafter seek naturalization under Section 701. But *68 Filipinos* was not certified as a class action and the government accordingly had no reason to expect that its failure to prosecute the appeal in *68 Filipinos* would bind it in all future cases. See *Baxter* v. *Palmigiano*, 425 U.S. 308, 311 n.1 (1976). Thus, by lending preclusive force to the legal holding of *68 Filipinos* in litigation brought by unrelated claimants, the court of appeals upset the reasonable expectations of the government as a litigant.

2. In treating the naturalization petitions of different individuals as presenting a single "demand" for purposes of the "unmixed question of law" exception to collateral estoppel, the court of appeals also divorced collateral estoppel from the fundamental purposes served by the preclusion doctrine: "protecting litigants from the burden of relitigating an identical issue with the same party or his privy" and "promoting judicial economy." *Parklane Hosiery* v. *Shore*, *supra*, 439 U.S. at 326. Plainly the first of these purposes is not served by preclusion on the legal issue in this case—respondent is not asked to bear the burden of relitigating any issue that he has previously litigated. In fact, respondent cannot fairly be said to bear any untoward burden at all; assuming that collateral estoppel does not apply he will merely be required to establish his qualifications for admission to United States citizenship.

Judicial economy is likewise little served by preclusion in the circumstances of this case, because no trial or other evidentiary proceedings would have been required to decide respondent's legal claim. The underlying legal issues were fully briefed and argued to the district court and the court of appeals. To be sure, the courts below were spared the labor of actually deciding the claim, but any economy achieved is a false one. As we explain below pages 30-34), if collateral estoppel bars redetermi-

nation of legal issues such as that presented here in subsequent unrelated cases, the government will be obliged to pursue appeals in an uncritical manner, abandoning the selective appeal policy currently in effect, and imposing substantial burdens upon the courts of appeals and this Court. In short, the court of appeals' analysis will retard rather than advance the pursuit of judicial economy.

3. The underlying issue in this case—whether respondent is entitled to naturalization because of an alleged denial of due process in the administration of Section 702 in the Philippines in 1945 and 1946—is, of course, one of constitutional law. Because Congress has no power to correct the decision in *68 Filipinos* by legislation, the effect of the court of appeals' decision is especially onerous. And it is significant that the decision in *68 Filipinos*, which is effectively accorded the force of a decision of this Court by the decision below, trenches upon the constitutional authority of the Executive to conduct the foreign relations of the United States (Art. II, § 2) and the authority of Congress to "establish a uniform Rule of Naturalization" (Art. I, § 8, Cl. 4). Accordingly, the court's warning against "[u]nreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues" (*Montana* v. *United States*, *supra*, 440 U.S. at 163) applies with special force here.

B. Collateral Estoppel Should Not Be Applied Against The Government To Preclude Determination Of Recurring Questions Of Public Law

Any ambiguity in the application of the *Moser* exception to the issue preclusion doctrine is removed by consideration of the additional circumstances that set this case apart from *Parklane Hosiery* and *Montana*. As the Court recognized in *Montana*, collateral estoppel is inapplicable whenever "special circumstances warrant an exception to the normal rules of preclusion." 440 U.S. at

155. And in *Parklane Hosiery*, the Court stated that courts should not apply collateral estoppel whenever for the reasons there discussed or for any "other reasons, the application of offensive [collateral] estoppel would be unfair to a defendant." 439 U.S. at 331. We submit that the unique attributes and role of the United States as a litigant strongly militate against application of the issue preclusion doctrine to the government, particularly when it is engaged in the uniquely sovereign function of enforcing the public law.

1. This Court recognized these unique attributes in *Standefer* v. *United States*, 447 U.S. 10 (1980), in declining to apply the rule of nonmutual collateral estoppel announced in *Parklane Hosiery* and *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), against the government in a criminal case. The Court stated, in terms that are fully applicable here (447 U.S. at 24-25):

> Finally, this case involves an ingredient not present in either *Blonder-Tongue* or *Parklane Hosiery*: the important federal interest in the enforcement of the criminal law. *Blonder-Tongue* and *Parklane Hosiery* were disputes over private rights between private litigants. In such cases, no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and there is no sound reason for burdening the courts with repetitive litigation.
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> That is not so here. The court of appeals put the point well:
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> > "[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is greater

> than the concern for judicial economy professed in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction. To plead crowded dockets as an excuse for not trying criminal defendants is in our view neither in the best interests of the courts, nor the public." 610 F.2d. at 1093.

In short, this criminal case involves "competing policy considerations" that outweigh the economy concerns that undergird the estoppel doctrine.

The fact that this case is not a criminal prosecution does not dilute the strength of the factors canvassed in *Standefer*. Whenever the government acts in its sovereign capacity to enforce the public laws, public policy dictates the applicability of the *Standefer* analysis. This is especially so where, as here, the government acts to ensure enforcement of the immigration and naturalization laws, which this Court has recognized as "[a]n increasingly important interest • • • of broad public concern." *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982), slip op. 5; see also *Fedorenko* v. *United States*, 449 U.S. 490, 506-507 (1981). As the Court recognized in *INS* v. *Hibi*, *supra*, 414 U.S. at 8: "[T]he Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress. • • • [I]n enforcing the cutoff date established by Congress [in Section 701, the INS] is enforcing public policy established by Congress."

Numerous practical and legal considerations, applicable in criminal and non-criminal cases alike, also set the United States apart from any other litigant and argue strongly against the estoppel invoked by the court of appeals. First, the government is involved in far more litigation than any other party.[20] In 1982, for instance, the

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[20] In 1982, the United States was a party to 75,773 civil cases filed in the United States District Courts, out of a total of 206, 193 filings. Administrative Office of the United States Courts, *Annual Report of*

Solicitor General acted upon recommendations respecting the desirability of appellate, en banc or certiorari review of a decision adverse to the government in over 2,100 cases. Second, many of the issues of greatest public importance, including constitutional issues, arise only in litigation to which the government is a party; others are characteristically associated with government litigation. See *American Medical International, Inc.* v. *Secretary of HEW*, 677 F.2d 118, 121 n.24 (D.C. Cir. 1981). Third, the government, unlike other litigants, necessarily finds itself in litigation presenting a particular legal issue in a host of jurisdictions—indeed potentially (and not uncommonly) in every district and circuit. In such cases, which include the present one, the potential unfairness of invoking the preclusion doctrine absent mutuality (see *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 330 & n.14) is necessarily present, for there is a substantial likelihood that in litigating a recurring issue, the government will at some point encounter an adverse decision.

Because of these unique attributes of government litigation, application of collateral estoppel in the circumstances of cases such as the present one would substantially disrupt the existing process of development of the public law. In that system courts of coordinate rank are not bound by each other's decisions on questions of law. See, *e.g.*, *Frock* v. *United States Railroad Retirement Board*, 685 F.2d 1041, 1046 (7th Cir. 1982) ("Federal appellate courts can, and do, differ in their conclusions as to the law * * *" (footnote omitted)). Instead, the courts apply the more flexible doctrine of *stare decisis*, and give such persuasive effect as is due in a particular case to the decisions of coordinate courts from other jurisdictions and the decisions

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the Director 98 (1982). In the same year the United States was a party to 5,517 of 18,784 civil cases appealed from the district courts to the courts of appeals as well as 4,767 criminal appeals and 3,118 original actions to review the decision of an administrative agency. *Id.* at 79, 82.

of inferior courts.[21] The law emerges through the hierachical process of appeal, en banc review and, in proper cases, certiorari.

Issue preclusion in private litigation—even if extended to legal questions—ordinarily does not unduly undermine this process of development of the law because no single litigant is party to more than a small fraction of factually unrelated cases presenting a common legal question. By contrast, the government is characteristically, if not invariably, a party to litigation on public law questions. Accordingly, application of collateral estoppel when the government has unsuccessfully litigated a question of law in any court inferior to this one would freeze the development of the law. Yet this Court has repeatedly recognized the value of allowing independent consideration of legal issues by the various courts of appeals. See, *e.g.*, *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 & n.26 (1977). Of course, that practice is a centerpiece of the Court's scheme for administering its certiorari jurisdiction. Sup. Ct. R. 17.1(a).[22]

Like the Second Circuit in *Olegario* (see pages 13-14, *supra*), the courts of appeals have generally recognized that these considerations preclude application of collateral

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[21] The court of appeals' suggestion (Pet. App. 17a) that the considerations we have canvassed might be more weighty when an issue arises in two different circuits simply illustrates the court's failure to recognize the difference between collateral estoppel and *stare decisis*. Under the court of appeals' analysis the decision of a single district court may be binding upon a court of appeals, while the authority of decisions of one or more courts of appeals, even those rendered en banc, may be regarded as merely persuasive.

[22] On those rare occasions when Congress has wished to make the decision of a single court of appeals respecting a particular issue final save only for review by this Court, it has done so explicitly, by designating a single forum for litigation of questions of nationwide importance. See, *e.g.*, Section 211(b)(1) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note; Section 307(b)(1) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(b)(1).

estoppel to the government on recurring legal issues. *American Medical International, Inc.* v. *Secretary of HEW*, *supra*, 677 F.2d at 121-124; *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 808 (9th Cir. 1980); *Divine* v. *Commissioner*, 500 F.2d 1041 (2d Cir. 1974). The American Law Institute also has recognized that preclusion is inappropriate when

> The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based * * *.

Restatement (Second) of Judgments § 29(7) (1980). Thus, when "the party against whom the rule of preclusion is to be applied is a government agency responsible for continuing administration of a body of law applicable to many similarly situated persons * * * the rule of preclusion should ordinarily be superseded by the less limiting principle of *stare decisis*." *Id.* at § 29 comment i; see also *id.* at § 28(2) & comment c.[23]

2. Furthermore, invocation of collateral estoppel against the government on legal issues of public importance is inappropriate because, through the Office of the Solicitor General, the government, unlike any other litigant, employs a formal mechanism for determining whether to take an appeal from or seek certiorari review of an adverse judgment. See 28 C.F.R. 0.20. This process is rather selective, particularly at the certiorari stage.[24] Moreover,

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[23] The Restatement also cautions against use of collateral estoppel "when the issue was determined in the first action by a trial court and in the second action will probably be taken to an appellate court," and when "the issue is of general interest and has not been resolved by the highest appellate court that can resolve it." *Restatement (Second) of Judgments*, § 29 comment i. The decision of the court of appeals disregards these strictures as well.

[24] In 1982 the Solicitor General decided against appeal to a court of appeals from an adverse district court judgment in 621 of the 1,118 cases submitted for his consideration. Moreover, notwithstanding the substantial volume of appellate litigation in which the gov-

to a degree not approached by any private party, the government regularly takes into account factors other than its narrow interest in prevailing in a particular lawsuit in determining whether to seek further judicial review. As a result, the Solicitor General frequently decides against appeal or certiorari, in cases where the legal conclusions of the deciding court are believed to be erroneous.[25] Such decisions rest upon a host of other factors, including: a substantial measure of prosecutorial discretion, equitable and policy considerations, the perceived practical importance of the decision, recognition of the limited resources of the government and sensitivity to crowded dockets of the courts.[26] As we have explained above (pages 11-12 & note 12), the decision not to pursue an appeal in *68 Filipinos* was just such a decision.

The fact that the Solicitor General authorized withdrawal of the appeal in *68 Filipinos* does not affect the

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ernment is engaged (see page 28 note 20, *supra*), the Solicitor General authorized filing of a petition for a writ of certiorari in only 64 of the 579 cases in which formal consideration was given to seeking such review in 1982.

[25] The Solicitor General often acquiesces in the grant of a petition for a writ of certiorari to review a judgment favorable to the United States where a conflict between the circuits has developed. In many such instances, the conflicting decision adverse to the government is one that, although regarded as (and later held by this Court to be) erroneous, did not provoke the filing of a petition for a writ of certiorari. See, *e.g.*, *Howe* v. *Smith*, 452 U.S. 473, 479 (1981); *Steadman* v. *SEC*, 450 U.S. 91, 95 (1981); *Lewis* v. *United States*, 445 U.S. 55, 58 & n.4 (1980). See also *Tuten* v. *United States*, No. 81-6756 (Mar. 30, 1983), slip op. 3 n.3.

[26] See, *e.g.*, Note, *The Solicitor General and Intragovernmental Conflict*, 76 Mich. L. Rev. 324, 324-330 (1977); Carrington, *United States Appeals in Civil Cases*, 11 Hous. L. Rev. 1101, 1101-1105 (1974); Bork, *The Problems and Pleasures of Being Solicitor General*, 42 A.B.A. Antitrust L. J. 701 (1973); Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 Yale L. J. 1442, 1453-1457 (1969); Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A.J. 229 (1955).

proper analysis here. The United States, even as a litigant, does not abandon its role as the government. *INS* v. *Hibi*, *supra*, 414 U.S. at 8. As this Court has remarked, "[t]here is, of course, no rule of law to the effect that the Government must be consistent in its stance in litigation over the years. It has changed positions before." *Barrett* v. *United States*, 423 U.S. 212, 222 n.6 (1976). See also *NLRB* v. *Iron Workers*, 434 U.S. 335, 351 (1978); *Dixon* v. *United States*, 381 U.S. 68, 70-75 (1965); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957). As this case illustrates, the political process by which the United States changes policies from time to time in a democratic society is itself a powerful reason to preclude collateral estoppel against the government on matters of public law. Indeed, the decision of the court of appeals permits one administration to bind its successors even on questions of constitutional law. Contrary to respondent's suggestion (Br. in Opp. 13), the government did not in any relevant sense "concede[] the validity of the district court's judgment" by withdrawing the appeal in *68 Filipinos*. Of course, the government thereby bound itself not to challenge the judgment itself (see *Federated Department Stores* v. *Moitie*, 452 U.S. 394 (1981))—an obligation the government has more than fulfilled (see page 12 note 13, *supra*)—but it did not acquiesce thereby in the correctness of the district court's legal ruling.[27]

Nor is there any anomaly in the Department of Justice's reconsideration of its legal position on naturalization of Filipino veterans. The present position of the United States is quite simply that *68 Filipinos* was wrongly decided; the withdrawal of the earlier appeal did not reflect any different view. Respondent's suggestion (Br.

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[27] "The estoppel doctrine," as this Court noted in *Standefer* v. *United States*, *supra*, 447 U.S. at 23 n.18, "is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct." As this case shows, the government's failure to seek appellate review is not an accurate indicator that the adverse decision was correctly decided. See also page 31 & note 25, *supra*.

in Opp. 14), echoing the court of appeals (Pet. App. 12a, 13a, 15a), that the government has not adequately justified its change in position assumes that the United States has an obligation to justify its litigating conduct to the courts. That assumption is inconsistent with fundamental principles of our adversary system of justice, see *Hickman* v. *Taylor*, 329 U.S. 495, 510-512 (1947); cf. 5 U.S.C. 552(b)(5); Fed. R. Civ. P. 26(b)(3), and raises serious questions of separation of powers.

The government's practice of selective pursuit of appellate review benefits the public interest and facilitates sound judicial management. Adoption of the broad preclusion rule applied by the court of appeals would compel the United States to reconsider this salutary practice. Instead, the government would be obliged to consider an inflexible policy of appealing (and even seeking certiorari on) the first adverse decision rendered on a legal issue lest further review be foreclosed. See *Olegario* v. *United States*, *supra*, 629 F.2d at 215. As a result, the courts of appeals and this Court would be burdened prematurely and unnecessarily, and judicial economy—the touchstone of the preclusion doctrine—would be disserved.[28] More-

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[28] *United States* v. *Stauffer Chemical Co.*, 684 F.2d 1174 (6th Cir. 1982) ("*Stauffer II*"), cert. granted, No. 82-1448 (Apr. 18, 1983), well illustrates these considerations. There the court of appeals held that the government was collaterally estopped on a question of interpretation of a provision of the Clean Air Act by the decision of the Tenth Circuit on the same issue in *Stauffer Chemical Co.* v. *United States*, 647 F.2d 1075 (1981), aff'g 14 Env't Rep. Cases 1737 (D. Wyo. 1980) ("*Stauffer I*"), notwithstanding the contrary decision of the Ninth Circuit on that same issue in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (1981), aff'g Civ. No. 80-2087 (D. Idaho Oct. 15, 1980). The Sixth Circuit commented (684 F.2d at 1181):

> If EPA really believed that the decision of the Tenth Circuit in *Stauffer I* was wrong, it could have petitioned the Supreme Court for certiorari, but it did not avail itself of that remedy, and it is too late to do so now. EPA cannot collaterally attack the Tenth Circuit decision in the present case.

It is true that the government did not seek certiorari in *Stauffer I*. But at the time the case was decided there was no conflicting deci-

over, because of the limited docket of this Court, and the proliferation of statutes and litigation in recent years, constructions of the law that this Court might ultimately determine to be erroneous would more often be given finality. See, *e.g.*, *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982) (rejecting the view of four courts of appeals); *United States* v. *Foster Lumber Co.*, 429 U.S. 32 (1976) (rejecting the view of three courts of appeals); *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507 (1977) (rejecting the view of five courts of appeals). Plainly, there is no interest served by invocation of collateral estoppel in the circumstances of this case that would justify these detrimental consequences.[29]

3. Contrary to respondent's contention (Br. in Opp. 5-7) and the view of the court of appeals (Pet. App. 18a), *Montana* v. *United States*, *supra*, does not support the application of collateral estoppel in the circumstances of this case. As explained above (pages 21-25), this case, unlike *Montana* itself, plainly calls for the application of the "unmixed question of law" exception to the doctrine of issue preclusion.[30] *Montana* is also distinguishable be-

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sion of any court of appeals. Moreover, the pendency in the Ninth Circuit of *Bunker Hill*—an appeal from a district court decision favorable to the government on the statutory question—together with the pendency in the Sixth Circuit of Stauffer's appeal from the district court decision in *Stauffer II* that also favored the government necessarily counseled against application to this Court for further review in *Stauffer I*. Any other course would have disserved both the Court and those litigants who compete for a spot on its limited docket.

[29] At a minimum there is no basis for the court of appeals' assertion (Pet. App. 15a) that "[i]t should have come as no surprise to the government" that Judge Renfrew's decision in *68 Filipinos* would reach the claim of every Filipino veteran. As noted above, *68 Filipinos* was not a class action. Moreover, *Parklane Hosiery* had not been decided at the time the *68 Filipinos* appeal was withdrawn.

[30] As explained below (pages 39-42), the applicability of the *Moser* exception is especially clear here for the additional reason that the facts of this case are materially different from those addressed in *68 Filipinos*.

cause the circumstances presented there may essentially have called for application of res judicata principles.

More fundamentally, the policy and practical considerations we have outlined above (pages 25-34) had little application in *Montana*, for the issue presented in that case could arise in only two forums—the Montana state courts and the United States District Court for Montana. This consideration is especially significant because in *Montana*, unlike here, the government had engaged in conduct that may implicate the core concerns underlying the preclusion doctrine. It had litigated the issue to a conclusion in the Supreme Court of Montana, noted an appeal to this Court, then dismissed the appeal and pursued its parallel action in the federal court. The federal action, moreover, was filed just after the action in state court had been filed, and was stayed upon the government's stipulation pending resolution of the state court litigation. *Montana* is further disinguishable because the issue there was not one involving a body of law applicable to a class of similarly situated persons, but one affecting the proprietary interest of the United States. Accordingly, the government did not argue in *Montana*, as it does here, that application of the preclusion doctrine was inappropriate in light of its special attributes and responsibilities, and the Court's opinion does not reflect any view respecting our present contentions.

4. Both the court of appeals (Pet. App. 19a) and respondent (Br. in Opp. 12, 16) appear to acknowledge that collateral estoppel should not be applied against the government in some cases presenting legal issues. But because the court below saw no " 'critical' need for redetermination" of the underlying constitutional issue (Pet. App. 19a), saw no "compelling public interest in opposing the naturalization" of persons such as respondent (*id.* at 20a) and believed that the equities favored respondent (*id.* at 20a-21a), it held that the government was precluded from relitigating the constitutional issues pre-

sented here. None of these considerations justifies the court of appeals' decision.

The court of appeals' necessarily subjective conclusions regarding the "critical need for redetermination" and "compelling public interest" provide no standard for accurate prediction of which legal rulings, if not appealed by the government, would be given collateral estoppel effect in the future. Nor has respondent identified any objective criterion that could guide the government in its litigating decisions in the wake of the decision below. Because it is too late to reconsider whether to appeal by the time a court has decided in a subsequent case that a prior decision is binding, the decision of the court of appeals places the government in an unacceptable position. The court of appeals has arrogated to itself a standardless discretion to determine with the benefit of hindsight whether a fresh determination of the merits of a particular legal issue is in the public interest (see Pet. App. 20a).

In any event, the court of appeals erred in concluding that determination of the merits of the instant case is unwarranted. As explained above (page 27), the decisions of this Court, including *Hibi*, reflect that the enforcement of the naturalization laws in every individual case is of utmost public importance. The district court's holding in *68 Filipinos* that the actions of an Attorney General, taken for foreign policy reasons that the court acknowledged to be valid, violated the Due Process Clause is necessarily significant, without regard for the number of persons involved or the court of appeals' assessment of the equities. Moreover, while this Court's decision in *Hibi* makes clear that the equitable considerations mentioned by the court below are irrelevant to the merits of respondent's claim, it is particularly clear that these equities have no place in the calculus of decision where the issue is not whether respondent is entitled to naturalization, but only whether the United States is foreclosed from securing an adjudication of that question.

C. The Court of Appeals' Decision Disregards Other Established Limitations on the Issue Preclusion Doctrine

We have explained thus far that, because of the unique role of the government in enforcing the public law, nonmutual collateral estoppel on issues of law should never be applied against the United States. But even if that were not so generally, and *Parklane Hosiery* were regarded as controlling in government litigation, the court of appeals erred in approving application of that doctrine here.

1. The Court emphasized in *Parklane Hosiery* that the doctrine of nonmutual collateral estoppel must always be applied selectively and cautiously. 439 U.S. at 329-331. The Court mentioned, for example, that issue preclusion would be inappropriate when "the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *Id.* at 330; footnote omitted. Here, as the court of appeals acknowledged (Pet. App. 16a), Judge Renfrew's decision conflicts with the Second Circuit's subsequent decision in *Olegario*. See pages 13-14, *supra*. In addition, decisions inconsistent with *68 Filipinos* were rendered in *In re Kapili*, 473 F. Supp. 600 (E.D. N.Y. 1979); *In re Naturalization of Inton*, No. SA-79-CA-284 (W.D. Tex. July 3, 1980); *Pangilinan* v. *INS*, Pet. No. 251849 (N.D. Cal. Sept. 24, 1980); *Barretto* v. *United States*, Pet. No. 248806 (N.D. Cal. Aug. 15, 1980), and *Litonjua* v. *INS*, Pet. No. 23358-GT (S.D. Cal. Apr. 8, 1981). In view of this division of authority, the court of appeals should have taken an independent look at the merits of respondent's constitutional claim.

Of course, the district court decisions in the last three cases mentioned above were reversed by the Ninth Circuit, in reliance upon the decision in this case, citing *stare decisis* as the governing principle. *Barretto* v. *United States*, *supra*, 694 F.2d at 607.[31] But at the time the dis-

[31] In *Barretto* the court of appeals considered the naturalization applications of 16 Filipino "Category II" war veterans resting, like

trict court decisions in *Pangilinan*, *Barretto*, and *Litonjua* were rendered, the Second Circuit's decision in *Olegario* created a precedent in conflict with *68 Filipinos*. (By contrast, *Olegario* had not been decided when the district court ruled in the present case, although it had been decided prior to the time the court of appeals rendered its own decision.) Although the Ninth Circuit in *Barretto* refused to hold that the district courts' rejection of collateral estoppel was erroneous (694 F.2d at 607 n.9), the court of appeals, quite properly concerned about consistency of decision between this case and *Barretto*, invoked *stare decisis* to achieve the same result. In extending the holding of this case by means of *stare decisis* to cover cases first decided after *Olegario*, however, the court of appeals highlighted its original error in invoking collateral estoppel in this case.

The dilemma faced by the court of appeals in *Barretto* was of its own making. Because the claim presented in this case arises under a scheme of public law applicable to a class of persons, it was foreseeable (if not inevitable) when the court decided this case that cases such as *Barretto* would arise. Rather than employing *stare decisis* to extend the troublesome holding of this case to cover circumstances where the application of collateral estoppel was properly rejected by the district court, the court of appeals should have recognized that the very policies of "consistency and fairness" it invoked in *Barretto* (694 F.2d at 607) required it to reach the merits in the present case, rather than relying upon the artifice of collateral estoppel.

2. Other factors also should have precluded any estoppel here. As we have noted (page 15 & note 17), the court of appeals rested its decision entirely upon the preclusive

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respondent Mendoza's, upon Sections 701-705 of the 1940 Act and the due process theory endorsed by the district court in *68 Filipinos*. The facts and proceedings in *Barretto* are described in detail in our reply brief in support of the petition in this case (at 2-5).

effect of *68 Filipinos*, even though significant legal contentions not addressed by Judge Renfrew in that case were presented by the government throughout the litigation of respondent's claim. The court of appeals thus effectively applied the broader *res judicata* ("claim preclusion") doctrine, rather than collateral estoppel, to bar all arguments the United States might raise in answer to respondent's claim. See *Allen* v. *McCurry*, 449 U.S. 90, 94 & n.5 (1980). There can be no justification for the court of appeals' refusal to consider legal arguments that might have been, but were not, addressed in *68 Filipinos*.

Among the points the court of appeals simply did not address were arguments that respondent's claim is expressly barred by 8 U.S.C. 1421(e) and by laches, and that respondent is not entitled to naturalization because he suffered no prejudice, which is an essential element of any due process claim. The government also made additional arguments, not considered in *68 Filipinos*, that respondent's due process claim cannot be reconciled with this Court's decision in *Hibi*. The issues raised by the government that the court of appeals ignored are important ones, not previously litigated, that bear upon the uniformity and stability of administration of our nation's naturalization laws, the availability of judicial oversight of executive action in the sensitive sphere of foreign relations, and the *stare decisis* effect of this Court's rulings. Accordingly, the court of appeals' failure to limit the scope of collateral estoppel to those issues actually litigated and determined in a prior action is particularly troublesome.

3a. An equally remarkable feature of the decision below is the court's conclusion (Pet. App. 11a-12a n.8) that respondent's residence in Pennsylvania during most of the time a naturalization examiner was absent from the Philippines does not serve to distinguish him sufficiently from the petitioners in *68 Filipinos* to require an independent determination of his right to naturalization. It is fundamental that collateral estoppel has no application

where the facts of successive cases are in material respects different. *Montana* v. *United States*, *supra*, 440 U.S. at 158-159; *Commissioner* v. *Sunnen*, *supra*, 333 U.S. at 601.

While we question whether any person who made no effort to avail himself of the opportunity for naturalization provided by Section 701 of the 1940 Nationality Act should be heard to complain of the temporary absence of a naturalization official from the Philippines, it is far clearer that persons such as respondent can make no such claim. And even if, as the court of appeals thought, the facts of this case "*implicate*" respondent's due process rights (Pet. App. 12a n.8; emphasis added), there is no reason whatever to conclude that the holding of *68 Filipinos*, which takes no account of these facts, precludes a determination whether those rights were actually *violated*. By invoking collateral estoppel, the court of appeals thus failed to discharge its duty to determine whether, on the facts of this case, respondent is entitled to naturalization under the laws of the United States.[32]

b. Again the court of appeals' error is highlighted by its subsequent decision in *Barretto*. In that case individual petitioner Barretto, unlike the 15 other naturalization petitioners whose claims were considered, had filed his naturalization petition prior to withdrawal of the appeal in *68 Filipinos*. He thus arguably fell within the grandfather rule applied by the Solicitor General in cases arising before that date (see page 12 note 13, *supra*). Barretto's naturalization petition was nevertheless opposed by the INS because he could establish no prejudice resulting from the manner in which Section 702 had been administered in the Philippines. Barretto had spent the period February 1945 through June 10, 1946, in the United

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[32] Because of the differences between the facts of this case and those considered in *68 Filipinos*, this case, unlike *Montana* v. *United States*, *supra*, 440 U.S. at 163, plainly calls for application of the "unmixed question of law" exception to the doctrine of issue preclusion. See pages 20-25, *supra*.

States undergoing flight training, and had actually filed a preliminary application for naturalization under the 1940 Act while in the United States. That application had evidently been rejected because it lacked the necessary signature of his commanding officer. Twenty days after his return to the Philippines, Barretto was discharged from the United States armed forces and became ineligible for overseas naturalization under Section 702 of the 1940 Act. He thus was stationed in the Philippines for only 20 days when naturalization there under Section 702 was impossible because of the absence of a naturalization official.

The court of appeals nevertheless held that Barretto's situation was indistinguishable from that of other Category II veterans who filed their petitions in time to avail themselves of the "grandfather rule," and that *Mendoza* required that Barretto's petition be granted. 694 F.2d at 608-609. The court explained (*id.* at 608; emphasis added):

> In *Mendoza* we found that Dr. Mendoza's presence in the Philippines for as much as three months, after having been in the United States for several months, was sufficient to implicate Dr. Mendoza's due process rights, 672 F.2d at 1326 n.8; we know of no principled basis—and the government offers none—for drawing a line between three months in Dr. Mendoza's case and three weeks in this case. *If the government's conduct violated the constitutional rights of Filipinos serving in the United States armed forces in the Philippines, it violated their rights whether they were in the Philippines for nine months or nine days.*

The court of appeals' holding that neither respondent nor Barretto is situated sufficiently differently from the Category II veterans in *68 Filipinos* to warrant an individualized determination of his rights is nothing short of bizarre. Barretto was deprived of the opportunity for overseas naturalization for only 20 days, had ample op-

portunity for naturalization in the United States, and actually made such an application. Despite these material distinctions from *68 Filipinos*, the court of appeals ordered the government to grant Barretto's naturalization petition, even though the district court had found, after reaching the merits, that he was not entitled to that benefit. The court of appeals' decision in this case thus indicates that all Filipino veterans are entitled to naturalization notwithstanding the absence of any showing of prejudice in a particular case. That result squarely conflicts with this Court's teaching that a showing of prejudice is a necessary element of a due process claim. See *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 10.

4. A final factor that should have caused the courts below to eschew reliance upon collateral estoppel and to make a fresh determination of the merits is the substantial tension between the holding of *68 Filipinos* and this Court's decision in *Hibi*. In *Hibi* this Court confronted a claim identical to respondent's in all respects, except one—the label attached to the legal theory employed, which has now been changed from "estoppel" to "denial of due process". But the Court's conclusion in *Hibi*, stated without qualification, was that Hibi's "effort to claim naturalization under a statute which by its terms had expired more than 20 years before he filed his lawsuit must * * * fail." 414 U.S. at 9. Moreover, neither the Court's opinion nor the argument of Hibi's counsel was dependent upon the technical elements of equitable estoppel doctrine. On the contrary, the argument advanced by Hibi and rejected by this Court is not meaningfully distinguishable from the arguments later adopted in *68 Filipinos*.[33]

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[33] In this Court Hibi argued that under Section 701 the INS had an absolute duty to make naturalization possible for servicemen eligible under Section 701 except where wartime conditions made that impractical (Memo. in Opp. at 3-5, *INS* v. *Hibi*, No. 72-1652 (1973 Term)); that the Attorney General impermissibly "*single[d] out Filipino soldiers in the Philippines * * * to deny to all of them the*

It is difficult to reconcile Judge Renfrew's conclusion in *68 Filipinos* that Attorney General Clark's actions denied due process of law to Filipino veterans with this Court's conclusion (414 U.S. at 8-9) that the very same actions did not constitute "affirmative misconduct." For present purposes, however, we need not conclude that *Hibi* is dispositive of the merits of respondent's claim. It is enough to conclude that due regard for the authority of this Court's decisions required the district court and court of appeals in this case to treat the decision in *68 Filipinos* as one at least potentially "inconsistent with * * * [a] previous judgment[] in favor of" the United States (*Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 330), and thus to consider respondent's claim against the United States on its merits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1983

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opportunity to accept the offer of citizenship tendered them by Congress" (*id.* at 6; emphasis added); that the Executive's action violated the principle of separation of powers; and that the Executive "*failed to obey his constitutional mandate to enforce the laws*" (*ibid.*; emphasis added). Hibi also disavowed any narrow or technical construction of his "equitable estoppel" claim, arguing that "[e]quitable estoppel is only the name for a legal principle employed by the courts below to enforce [the] promise" to alien servicemen said to be contained in Section 701 (Mem. in Opp. at 12).

APPENDIX

STATUTES AND REGULATION INVOLVED

1. 28 C.F.R. 0.20 provides in pertinent part:

> The following-described matters are assigned to, and shall be conducted, handled, or supervised by the Solicitor General, in consultation with each agency or official concerned:
>
> * * * * *
>
> (b) Determining whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing *en banc* and petitions to such courts for the issuance of the extraordinary writs) * * *.

2. Sections 701, 702, and 705 of the Nationality Act of 1940, as amended, ch. 199, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002 and 1005, provided in pertinent part: [1]

> Sec. 701. * * * [A]ny person not a citizen regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and Who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the

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[1] The Nationality Act of 1940 was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 280.

naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; * * * *Provided, however*, That * * * the petition shall be filed not later than December 31, 1946. * * *

Sec. 702. During the present war, any person entitled to naturalization under Section 701 of this Act, who while serving honorably in the military * * * forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship; * * *

> Sec. 705. The Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this Act.

3. Section 310(e) of the Immigration and Nationality Act of 1952, as added by Pub. L. No. 87-301, 75 Stat. 656, 8 U.S.C. 1421(e), provides:

> Notwithstanding the provisions of section 405 (a)[2] any petition for naturalization filed on or after September 21, 1961, shall be heard and determined in accordance with the requirements of this subchapter.

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[2] Section 405(a) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 280, was a general savings clause that preserved the legal effectiveness of certain acts taken under provisions of prior law that were in other respects superseded by the 1952 Act.

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